Supreme Court, U.S.
FILED

No. 10-525 OCT 15 2010

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In The

Supreme Court of the United States

IN RE: WILLIAM E. ORCUTT

**On Petition For Writ Of Mandamus
To The United States Court Of Appeals
For The Tenth Circuit**

PETITION FOR WRIT OF MANDAMUS

WILLIAM E. ORCUTT, Pro se
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QUESTIONS PRESENTED FOR REVIEW

1.) Does the Federal District Court lack subject matter jurisdiction?

2.) Does the *Rooker-Feldman Doctrine* foreclose jurisdiction to a Federal District Court when *different* issues are presented to the Federal District Court than in a State Court?

3.) Do litigants need to exhaust their administrative remedies prior to bringing a Title 42 U.S.C. § 1983 suit in Federal Court while there are other pending matters?

PARTIES TO THE PROCEEDING

The Parties to the proceeding are:

William E. Orcutt, Petitioner

Brandon Libel, In His Individual Capacity Only – Respondent

Tony Libel, In His Individual Capacity Only – Respondent

Brice Libel, In His Individual Capacity Only – Respondent

Joel R. Euler, In His Individual Capacity Only – Respondent

Ira Dennis Hawver, In His Individual Capacity Only – Respondent

James A. Needham, In His Individual Capacity Only – Respondent

Thad Geiger, In His Individual Capacity Only – Respondent

City of Elwood, State of Kansas, In Its Individual Capacity Only – Respondent

Darrell Lamme, In His Individual Capacity Only – Respondent

Larry Hunsaker, In His Individual Capacity Only – Respondent

Doniphan County, State of Kansas, In Its Individual Capacity Only – Respondent

Jerry R. Dubach, In His Individual Capacity Only – Respondent

Robert Orcutt, In His Individual Capacity Only – Respondent

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CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE

United States Court of Appeals for the Tenth Circuit Order and Judgment on June 9, 2010 dismissing Plaintiff's-Appellant's claims against Defendants-Appellees and Order denying Plaintiff's-Appellant's petition for rehearing on July 15, 2010.

JURISDICTION

This Honorable Court has jurisdiction to issue extraordinary writs under Title 28 U.S.C. § 1651(a) and U.S. Supreme Court Rule 20 (especially) "except in certain narrowly defined circumstances" where extreme violations have occurred.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

The Constitution of the United States of America, Fifth and Fourteenth Amendment rights of due process and equal protection under the law.

The United States Constitution, Fifth Amendment, states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service

> in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The United States Constitution, Fourteenth Amendment, Section 1, states:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE FACTS

The Plaintiff-Appellant was denied his constitutional rights and a Complaint was filed in the United States District Court for the District of Kansas. An appeal was made to the United States Court of Appeals for the Tenth Circuit which was denied as well as a petition for an en banc hearing.

STATEMENT OF THE ISSUES

1.) Whether the Federal District Court lacked subject matter jurisdiction.

2.) Whether the Honorable Tenth Circuit Appellate Court erred in dismissing Plaintiff-Appellant's case, ruling that the *Rooker-Feldman Doctrine* forecloses jurisdiction to a Federal District Court when different issues are presented to the Federal District Court than in a State Court.

3.) Whether litigants need not to exhaust their administrative remedies prior to bringing a Title 42 U.S.C. § 1983 suit in Federal Court while there are other pending matters.

STATEMENT OF RELIEF SOUGHT

The Petitioner requests and demands that his due process of law and equal protection of the law under the Fifth and Fourteenth Amendments of the U.S. Constitution be respected. This means that the Petitioner is entitled to his case being treated as separate and apart from a State case which had different issues than the Federal case.

REASONS WHY THE WRIT SHOULD ISSUE

The U.S. Supreme Court has spoken concerning the issues involved in this instant case while it was pending. The Honorable District Court has

refused to recognize and/or follow the rulings of the U.S. Supreme Court in violation of the rule of law. This Honorable Appellate Court has spoken on the fundamental rule of law principle that must be applied to this instant case as follows:

> *"It is a fundamental rule of law that a trial court is required to honor and respect the rulings and mandates by appellate courts in a case. See* ***Casey v. Planned Parenthood****, 14 F.3d 848, 856 (3rd Cir. 1994). The rule is fundamental to the effective operation of our multitiered judicial system. See* ***Litman v. Mass. Mut. Life Ins. Co.****, 825 F.2d 1506, 1508 (11th Cir. 1987). It accounts for our orderly system of justice, which in turn contributes in a substantial way to the overall stability of our society. Since its earliest days, the United States Supreme Court recognized that "an inferior court has no power or authority to deviate from the mandate issued by an appellate court."* ***Briggs v. Pennsylvania R. Co.****, 334 U.S. 304, 306, 68 S.Ct. 1039, 1040, 92 L.Ed. 1403, 1405 (1948).*

City of Okoboji v. Iowa District Court for Dickson County, No. 130/06-1483 (2008). (Emphasis added.)

The District Court Order ignores the established principles of law.

Stare decisis –

"The bedrock of stare decisis is that lower courts are bound by the precedential authority of cases rendered by higher courts. *U.S. Ex Rel. Shore v. O'Leary*, 833 F.2d 663 at 667 (7th Cir. 1987). This limitation on judicial power is one of the cornerstones of the legal structure in that it serves broader societal interests such as the orderly and predictable application of legal rules." *Miller v. U.S.*, 868 F.2d 236 (1989).

"One foundation block of our judicial system is the principle of stare decisis, which demands adherence to precedents. Decisions are made in accord with previous authoritative decisions in similar cases emanating from one's own circuit and from the Supreme Court. A lower court owes deference to those above it; ordinarily it has no authority to reject a doctrine developed by a higher court. See, e.g., *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535, 103 S.Ct. 1343, 1344, 75 L.Ed.2d 260 (1983) (per curiam); *Perri v. Director, Dept. of Corrections of Ill.*, 817 F.2d 448, 451 n. 4 (7th Cir. 1987)." *U.S. ex rel. Shore v. O'Leary*, supra.

"Needless to say, *only this Court may overrule one of its precedents*. Until that happens [our decision] is the law . . . " (Emphasis added.) *Thurston Motor Lines, Inc. v. Jordan Rand, Ltd.*, 460 U.S. 533.

The Petitioner pled throughout the Complaint that his constitutional rights were violated. Due process and equal protection are constitutional rights that the Appellees violated. The *Rooker-Feldman Doctrine* does not apply in this case.

The Federal Court did not lack subject matter jurisdiction.

The jurisdiction to try this case is under Title 42 U.S.C. § 1983; the Petitioner is entitled to the Federal jurisdiction as asserted under Title 28 U.S.C. § 1343, which in material part reads as follows:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:"
>
> "To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

The *Rooker-Feldman Doctrine* would not bar an action in this case.

The Petitioner in this case was *not* asking a Federal District Court to overturn an injurious court judgment and is *not* challenging the merits of the case which makes the *Rooker-Feldman Doctrine* inapplicable. *Exxon Mobil Corp. v. Saudi Basic Indus.*

Corp., 544 U.S. 280, 125 S.Ct. 1517 (2005). The Petitioner in this case is only asking for damages from individual Defendants-Appellees for only their personal wrongful acts against the Petitioner to be paid with individual funds, not state funds.

Additionally, the overt wrongful acts or counts in the original complaint are all in the context of bad faith and harassment, outside of any state interests. Federal law rights were violated by the Defendants-Appellees in this instant case, leaving them open for a § 1983 lawsuit. The Federal Court must intervene because the state proceedings did not provide a meaningful opportunity to adjudicate constitutional claims. *Middlesex Ethics Comm. v. Garden State Bar Assn.*, 102 S.Ct. 2515 (1982). Under *Ex Parte Young*, 209 U.S. 123 (1908) and its progeny, a suit challenging the legality under federal law of a state official's action in enforcing state law is not a suit against the state, and hence is not subject to state or federal exhaustion requirements. *Id.* at 159-160. *Duke Energy Trading and Marketing v. Davis,* 267 F.3d 1042 (9th Cir. 2001), supra. Therefore, the Defendants-Appellees stand as *individuals-only* before this court.

The Defendants-Appellees must show that their alleged unconstitutional acts were within the perimeter of their authority and discretion. *Butz v. Economou*, 438 U.S. 478, 483-484 (1978). The Defendants-Appellees started their individual illegal and unconstitutional acts because they were unable to legally deal with the Petitioner, by virtue of their not qualifying to be *peer reviewers* of the Petitioner.

Any defenses are definitely outside the jurisdiction and authority of the Defendants-Appellees.

The record is that the State Court could not control the state officers in any *individual* capacity in this case. The State Court has no jurisdiction, authority or control over those same persons in their individual capacity. The issues in the Title 42 U.S.C. § 1983 suit go beyond the merits dealing with state officials. The Defendants-Appellees were acting beyond their official capacity by using out-of-practice-area, non-peer intimidation, fraud, and deceit to thwart the Petitioner.

Defendants-Appellees violated Petitioner's civil and Constitutional rights by trespassing, breaking and entering, inappropriate treatment of Petitioner's private property from his home and businesses which is theft.

The Complaint involved an individual who alleged violations of the U.S. Constitution by individuals. The State Court actions alleged a violation of a state statute.

1.) The Complaint involved parties in their private or individual capacities not in their public or official capacities. The Plaintiff was prosecuted for his acts dealing with the public.

2.) The Complaint involved non-official members as parties or defendants.

3.) The Complaint involved merits involving violations of constitutional rights of due process of law, equal protection under the law, etc. of an individual.

In 2005, the U.S. Supreme Court sharply limited the scope of the *Rooker-Feldman Doctrine* in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, supra. The effect of the *Exxon Mobil*, supra, case has been recently described by one lower Federal court considering its jurisdiction as follows:

The *Rooker-Feldman Doctrine* is jurisdictional in nature. It provides that lower federal courts lack jurisdiction to engage in appellate review of state court determinations. *Bolden v. Topeka*, 441 F.3d 1129, 1139 (10th Cir. 2006). Only the United States Supreme Court may do so. *Id.* It is distinct from other preclusion doctrines, such as collateral estoppels and res judicata, not only because it is jurisdictional in nature, but also because it is applicable only in very limited circumstances. As explained by the Supreme Court:

> The Rooker-Feldman doctrine is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments. *Rooker-Feldman* does not otherwise override or supplant preclusion doctrine.

Exxon Mobil Corp. v. Saudi Basic Industries Corp., supra. The *Exxon Mobil* Court further emphasized that *Rooker-Feldman* does not stop a federal court from exercising subject-matter jurisdiction simply because a party attempts to litigate in federal court a matter previously litigated in state court. If a Federal plaintiff "present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion." *Id.* at 293, 125 S.Ct. 1517 [quoting *GASH Assocs. v. Rosemont*, 995 F.2d 726, 728 (7th Cir. 1993)]. In other words, when the federal court tries a matter anew and reaches a conclusion contrary to a judgment rendered by a state court, without concerning itself with the bona fides of the prior judgment, it is not conducting appellate review. *Bolden v. City of Topeka*, supra. It is only when the claim or defense raised seeks specifically to attack the prior state court judgment or seeks relief for injury caused by the state court judgment that the *Rooker-Feldman Doctrine* applies. *In re Jensen*, 395 B.R. 472, 489 (B.C. D. Colo. 2008).

Petitioner's claims are not barred by *Younger Abstention Doctrine.*

Exhaustion of state court remedies is not required under *Younger v. Harris*, 401 U.S. 37 (1971).

"The application of the *Younger* principle to pending state administrative proceedings is fully consistent with *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982), which holds that litigants need not exhaust their administrative remedies prior to bringing a § 1983 suit in federal court. *CF Huffman v. Pursue, Ltd.*, 420 U.S. 592, 607-611 (1975)." *Ohio Civil Rights Comm'n v. Dayton Schools*, 477 U.S. 619 (1986); *McNeese v. Board of Education,* 373 U.S. 668 (1963); *Younger v. Harris*, 401 U.S. 37. As these cases support, an exhaustion of state court remedies is not required in this Petitioner's Federal case.

There are three exceptions to the *Younger Abstention Doctrine*:

1.) Where the prosecution is in bad faith (i.e. the state knows the person to be innocent); or

2.) Where the prosecution is part of some pattern of harassment against an individual; or

3.) Where the law being enforced is utterly and irredeemably unconstitutional.

All three exceptions apply in this case.

CONCLUSION

This Petition for Writ of Mandamus must be granted and the Order must be abated concerning the

Appellate Court's dismissal due to the *Rooker-Feldman Doctrine* and the *Younger Abstention Doctrine*.

THEREFORE, Appellant moves this Honorable Appellate Court to: 1) rule in favor of Petitioner on all counts, 2) order Defendants-Appellees to pay their acquiesced debt(s), 3) order all of the Defendants-Appellees to comply with Petitioner's discovery requests within thirty days, and 4) to enter an Order to overturn the Appellate Court's and District Court's judgments in their misunderstanding of the issues.

Respectfully submitted,

Date: October 15, 2010

WILLIAM E. ORCUTT, Pro se
5914 North Belt Hwy.
St. Joseph, Missouri 64506
(816) 617-2824

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILLIAM E. ORCUTT,

Plaintiff-Appellant,

v.

BRANDON LIBEL; TONY LIBEL; BRICE LIBEL; JOEL R. EULER; IRA DENNIS HAWVER; JAMES A. NEEDHAM; THAD GEIGER; CITY OF ELWOOD, KANSAS; DARRELL LAMME; LARRY HUNSAKER; DONIPHAN COUNTY, KANSAS; JERRY R. DUBACH; ROBERT ORCUTT, also known as Bobby Dean Orcutt, in their individual capacities only,

Defendants-Appellees.

No. 09-3293
(D.C. No. 2:09-CV-02025-MLB-DJW)
(D. Kan.)

ORDER AND JUDGMENT*

(Filed Jun. 9, 2010)

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Before **McKAY**, Circuit Judge, **BRORBY**, Senior Circuit Judge, and **EBEL**, Circuit Judge.

Plaintiff-appellant William Orcutt, appearing pro se, appeals the dismissal of his complaint under 42 U.S.C. § 1983. In his complaint, Mr. Orcutt asserted thirty-five claims against thirteen defendants. The defendants were various attorneys, state employees, and witnesses involved in three state court actions concerning Mr. Orcutt. The first two were foreclosure actions brought by Farmers State Bank of Wathena, Kansas (Farmers) and Troy State Bank of Troy, Kansas (Troy) to recover debt owed by Mr. Orcutt. Mr. Orcutt lost these suits and did not appeal from the judgments. The third action was a criminal action in which Orcutt was convicted of impairment of a security interest under Kansas law. His criminal appeal was pending at the time he filed his federal complaint.

The district court dismissed all but four of the claims in Mr. Orcutt's complaint pursuant to *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), noting that under the *Rooker-Feldman* doctrine, it had no jurisdiction to review the state court civil orders at issue in the complaint. Two of Mr. Orcutt's claims appeared to question the ongoing criminal proceedings against him. The district court abstained from considering those claims under the doctrine set forth in *Younger v. Harris*, 401 U.S. 37

(1971). Mr. Orcutt's final two claims appeared to contend that defendants violated certain criminal laws. The district court dismissed those two claims for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), on the ground that private citizens cannot prosecute criminal actions unless a private right of action is expressly provided. Mr. Orcutt appeals the dismissals under the *Rooker-Feldman* and *Younger* abstention doctrines.

We have jurisdiction over Mr. Orcutt's appeal under 28 U.S.C. § 1291. Although it appears that a counterclaim against Mr. Orcutt remains outstanding, the district court certified its dismissal of Mr. Orcutt's claims as final pursuant to Federal Rule of Civil Procedure 54(b). This court reviews de novo a district court's decision to abstain from exercising jurisdiction under the *Younger* doctrine. *Amanatullah v. Colo. Bd. of Med. Exam'rs*, 187 F.3d 1160, 1163 (10th Cir. 1999). We likewise review de novo a district court's dismissal of a complaint for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine. *Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163, 1165 (10th Cir. 1998).

We have carefully reviewed the parties' appellate briefs, the district court's order, and the remainder of the appellate record. It seems clear from the complaint that Mr. Orcutt intends to directly attack the state court decisions. He asserts that the foreclosures were illegal and seeks "an immediate temporary injunction due to the continuing abuse, actions and violations of substantial rights caused by the

Defendants." R., Vol. 1, Part 1 at 27. He also seeks monetary damages against a variety of government actors and private individuals; it appears that most of these damages are for actions taken in complicity with the state court's foreclosure decisions. Therefore, these claims are "inextricably intertwined" with those foreclosure decisions because they "assert injuries based on the [state court decisions] and, for [him] to prevail, would require the district court to review and reject those [decisions]." *See Mann v. Boatright*, 477 F.3d 1140, 1147 (10th Cir. 2007). To the extent that Mr. Orcutt is seeking to have the district court enjoin the state court decisions, or is seeking damages from the defendants for actions taken in compliance with those decisions, the dismissal is affirmed for substantially the reasons set forth in the district court's September 23, 2009 dismissal.

We note, however, that the claims in Mr. Orcutt's complaint are so conclusory that we are unable to discern exactly what acts he is complaining about, or who is supposed to have committed those acts. Thus, he might also be – and probably is, considering the imprecision of his claims – seeking damages arising from acts of the parties that are not "inextricably intertwined" with the state court's decision. To the extent that he seeks such damages, the court's dismissal must still be upheld for failure to state a claim upon which relief could be granted under Federal Rule of Civil Procedure 12(b)(6). *See Amro v. Boeing Co.*, 232 F.3d 790, 796 (10th Cir. 2000) ("[W]e may affirm the district court's decision for any reason

supported by the record."). As noted by the district court, the conclusory nature of the claims makes it nearly impossible to tell exactly what the claims are or who they are against. *See* R., Vol. 3 at 110 n.6 ("Plaintiff alleges in conclusory fashion that defendants collectively conspired to unfairly and in bad faith take his property. . . . At no point in his complaint does plaintiff make clear exactly which defendant did what alleged violation."). Further, because there is no specificity to the claims, it is impossible to tell if they would be precluded under Kansas preclusion law. *See Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985) (holding that "[t]he preclusive effect of a state court judgment in a subsequent federal lawsuit generally is determined by the full faith and credit statute," 28 U.S.C. § 1738, which "directs a federal court to refer to the preclusion law of the State in which judgment was rendered").

The district court's dismissal of Mr. Orcutt's claims against defendants-appellees is AFFIRMED.

Entered for the Court

Monroe G. McKay
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILLIAM E. ORCUTT, Plaintiff-Appellant, v. BRANDON LIBEL, et al., Defendants-Appellees.	No. 09-3293 (D.C. No. 2:09-CV-02025-MLB-DJW)

ORDER

(Filed Jun. 15, 2010)

Before **McKay**, Circuit Judge, **BRORBY**, Senior Circuit Judge, and **Ebel**, Circuit Judge.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

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NOV 18 2010

No. 10-525

In the
Supreme Court of the United States

IN RE: WILLIAM E. ORCUTT

On Petition for a Writ of Mandamus to the United States Court of Appeals for the Tenth Circuit

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

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November 18, 2010

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Should Orcutt's Petition for Writ of Mandamus be denied because it is an untimely Petition for Writ of Certiorari?

2. Are Orcutt's claims arising out of state foreclosure proceedings barred under the *Rooker-Feldman* doctrine?

3. Did the district court err in declining to consider two claims arising out of pending criminal proceedings against Orcutt based on the *Younger* abstention doctrine?

4. Did the district court err in dismissing the balance of Orcutt's claims based on Fed.R.Civ.Pro. 12(b)(6)?

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STATEMENT OF THE CASE

Plaintiff William E. Orcutt proceeds pro se. His recitation of the facts is cursory and incomplete. It will be supplemented here pursuant to Supreme Court Rule 15(2). Most of the facts below are gleaned from the district court's opinion.

Orcutt was the defendant in two Doniphan County, Kansas, civil lawsuits, case nos. 2006-CV-1 (the Farmers State Bank lawsuit) and 2006-CV-30 (the Troy State Bank lawsuit). Orcutt was also prosecuted and convicted by a jury in a Doniphan County, Kansas, criminal trial, case no. 2007-CR-16, for violating K.S.A. 21-3734 (impairment of a security interest). Orcutt appealed his criminal case to the Kansas Court of Appeals, case number 08-101395A. The matter was ultimately affirmed in part, reversed in part, and remanded to the district court. Orcutt's petition for review was denied by the Kansas Supreme Court on March 31, 2010.

The district court set out the operative facts of the case as follows:

> "In 1984, plaintiff started a farm and home equipment business in Wathena, Kansas in which he leased and rented equipment. In the1990s, plaintiff formed A-1 Auto and Metal Salvage in which he bought and sold cars in Wathena. Farmers and Troy both made promissary notes and security agreements to plaintiff or his wife

individually or to an entity that plaintiff owned. Plaintiff's employees, Jason Orcutt and Bobby Orcutt, also took out loans from Farmers. These loans were secured by personal property and personal guarantees made to Farmers by plaintiff and his wife."

Farmers Lawsuit

"Farmers called the notes that were due and named plaintiff both individually and doing business as A-1 Metal and Salvage, Inc., Farmers and Home Equipment and Orcutt's Auto Sales as defendants. Plaintiff admitted liability on the promissory notes and stipulated that he and the other defendants, jointly and severally, owed Farmers $414,741.64."

"The Doniphan County, Kansas district court ('the Kansas court') determined the interests and obligations of all defendants. The Kansas court found that an express agency relationship existed among plaintiff, Jason Orcutt, and Bobby Orcutt in that the latter two were authorized to borrow money on behalf of plaintiff. The Kansas court entered judgment in favor of Farmers and granted its motion to extinguish redemption rights. The court ordered a sheriff's sale of real estate located in

> Doniphan County and confirmed and approved the sale on December 5, 2007. No notice of appeal was filed."

Troy Lawsuit

> "Troy called the notes that were due and named plaintiff, his wife, and Farmers as defendants. The Kansas court found that plaintiff was delinquent on the promissory notes, security agreements, and real estate mortgages and foreclosed on various real estate and secured property. The Kansas court also found that plaintiff had waived his right of redemption. A sheriff's sale of real estate located in Doniphan County was ordered and confirmed and approved by the Kansas court on June 22, 2007. No notice of appeal was filed." (Response, App. 4a-5a.)

Orcutt later filed suit against various defendants alleging violations under federal criminal statutes 18 U.S.C. §§ 241,1341, 1343, and 1962(c) and (d). Orcutt also alleged violations under federal civil statutes 42 U.S.C. §§ 1981, 1983, and 1985. Orcutt claimed that defendants conspired to illegally seize and sell his property in bad faith and used Kansas law and judicial proceedings to do so.

Defendants named in Orcutt's complaint were Brandon, Tony, and Brice Libel ("the Libels"), who are officers of Farmers State Bank and were witnesses

during the Farmers lawsuit. James Needham is the president of Troy State Bank and was a witness during the Troy lawsuit. Joel Euler is an attorney who represented Farmers in both civil lawsuits against Orcutt. Ira Dennis Hawver is an attorney who represented plaintiff in both civil lawsuits. Robert Orcutt is plaintiff's brother who allegedly forged plaintiff's name in order to borrow money. Thad Geiger and Needham were subpoenaed to testify in the felony criminal case against Orcutt. Darrell Lamme and Larry Hunsaker are employees of the City of Elwood, Kansas, which is also a defendant. Jerry Dubach is the sheriff of Doniphan County, which is also a defendant.

The district court observed that though Orcutt's complaint was "virtually devoid of facts," Orcutt's claims apparently stemmed from an alleged illegal foreclosure on his personal and real assets by Farmers State Bank and Troy State Bank. The foreclosures were based upon notes which Orcutt alleges were signed with his name by his brother and employee, Robert Orcutt, without authorization.

Orcutt also alleged, without specificity, that local law enforcement officers used illegal search warrants and other harassment methods to destroy Orcutt's businesses and well being. All other allegations of Orcutt's complaint were generic and failed to identify any specific defendant.

Orcutt's complaint failed to identify any specific act or omission of defendant Euler upon which his claims are based and failed to identify Euler individually at any point other than the paragraph in

which he identified Euler's residence address. Defendant Euler was not mentioned in any of Orcutt's alleged 35 counts in the complaint.

REASONS FOR DENYING THE WRIT

1. **Orcutt's Petition for Writ of Mandamus should be dismissed because it is an untimely Petition for Writ of Certiorari.**

Orcutt filed the instant Petition for Writ of Mandamus on October 15, 2010. In it, he attacks the reasoning contained in the decisions of the District Court and Tenth Circuit Court of Appeals. In his conclusion he asks this Court to enter an order overturning the decision of the courts below. This is the very essence of a Petition for Writ of Certiorari.

A Petition for Writ of Certiorari seeking relief from the decision of a federal circuit court of appeals must be filed within 90 days of entry of judgment. 28 U.S.C. §2101(c); Supreme Court Rule 13(1). The entry of judgment in this case occurred on June 9, 2010. Because Orcutt timely filed a petition for rehearing, the time to file a Petition for Writ of Certiorari in this case ran from the date rehearing was denied. Supreme Court Rule 13(1). Orcutt's petition for rehearing was denied on June 15, 2010.

Orcutt had 90 days to file a Petition for Writ of Certiorari beginning on June 15, 2010. This means his Petition for Writ of Certiorari should have been filed on or before September 13, 2010. Instead, it was filed

October 15, 2010, approximately one month late. Orcutt did not seek or receive a grant of additional time to file a Petition for Writ of Certiorari. See Supreme Court Rule 13(5).

Orcutt's Petition for Writ of Mandamus is, in reality, a Petition for Writ of Certiorari, and as such was untimely filed. The Petition should be dismissed.

2. **Orcutt's claims arising out of state foreclosure proceedings are barred under the *Rooker-Feldman* doctrine.**

The *Rooker-Feldman* doctrine is based on two United States Supreme Court cases, *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16, 44 S.Ct. 149, 68 L.Ed. 362 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983). The doctrine "prohibits a lower federal court from considering claims actually decided by a state court, and claims inextricably intertwined with a prior state-court judgment." *Kenmen Eng'g v. City of Union*, 314 F.3d 468, 473 (10th Cir. 2002) (internal citation and quotations omitted). A claim is inextricably intertwined if "the state-court judgment caused, actually and proximately, the injury for which the federal-court plaintiff seeks redress." *Id.* at 476. A federal case does not involve an "inextricably intertwined" state court judgment if the complaint challenges the constitutionality of the state law, so long as the state court did not address it and the plaintiff does not request the federal court to upset the state court judgment. *Id.*

The district court in this case reasoned:

"The court finds that the *Rooker-Feldman* doctrine precludes review of plaintiff's claims arising out of or otherwise related to the Farmers and Troy lawsuits. Viewed to the outer limits of liberal construction, plaintiff's allegations raise claims that were decided in favor of defendants by the Kansas court or are inextricably intertwined with the state judgments. The Kansas court found that Bobby Orcutt was authorized to borrow money on behalf of plaintiff by virtue of an express agency relationship. The Kansas court interpreted the contracts and determined the contractual rights and interests of the parties in both the Farmers and Troy lawsuits. It also found that plaintiff had no right of redemption in both lawsuits.

The Kansas court entered judgments in both the Farmers and Troy lawsuits which entitled the banks to foreclose on their security interests and to execute on other property to collect the debt owed by plaintiff. The Doniphan County sheriff took possession of plaintiff's properties pursuant to the judgments and sold the property in a sheriff's sale. The Kansas court found that the sale was regular and in

> conformity with Kansas law and equity." (Response, App. 9a)

Orcutt argues in his Petition for Writ of Mandamus that *Rooker-Feldman* does not apply because he does not seek to overturn the state court decisions. Instead, he argues, he simply seeks damages from individual defendants for personal wrongful acts committed against him to be paid out of each individual defendant's personal funds. This has nothing to do with the *Rooker-Feldman* analysis.

Orcutt's claims clearly attack the validity of the state court's orders in the foreclosure cases, or at the very least are inextricably intertwined with them. At page 8 of his Petition for Writ of Mandamus, Orcutt argues that defendants violated his constitutional rights by trespassing, breaking and entering and accuses them of "inappropriate treatment" of his personal property amounting to theft. All of these alleged violations happened in the context of the foreclosure proceedings.

Rooker-Feldman applies to bar Orcutt's claims and his Petition for Writ of Mandamus should be denied.

3. **The district court did not err in declining to consider two claims arising out of pending criminal proceedings against Orcutt based on the *Younger* abstention doctrine.**

The *Younger* abstention doctrine originated in *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). The doctrine prevents a federal district court from interfering in an ongoing state proceeding. *Weitzel v. Div. of Occupational & Prof'l Licensing of the Dep't of Commerce of Utah,* 240 F.3d 871, 875 (10th Cir. 2001). Further,

> "A federal court must abstain from exercising jurisdiction when: (1) there is an ongoing state criminal, civil, or administrative proceeding, (2) the state court provides an adequate forum to hear the claims raised in the federal complaint, and (3) the state proceedings involve important state interests, matters which traditionally look to state law for their resolution or implicate separately articulated state policies." *Id.*

The district court in this case said:

> "There are exceptions to the *Younger* abstention doctrine, one of which is a state prosecution undertaken in bad faith 'without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown.' *Id.* at 876. The plaintiff bears a heavy burden to show that the state action was: (1) 'frivolous or undertaken with no reasonably objective hope of success'; (2) 'motivated by defendant's suspect class or

in retaliation for the defendant's exercise of constitutional rights'; and (3) 'conducted in such a way as to constitute harassment and an abuse of prosecutorial discretion, typically through the unjustified and oppressive use of multiple prosecutions.'" *Id.* at 877.

"The court finds that the *Younger* abstention doctrine applies to plaintiff's case because he has failed to show that any, much less all, of the conditions do exist. First, plaintiff's appeal from his criminal conviction is currently pending before the Kansas Court of Appeals. Second, Kansas courts provide an adequate forum to hear plaintiff's complaints, which plaintiff is currently utilizing. Third, Kansas has an important state interest in considering defective complaints and prosecutions brought in bad faith and have state laws governing such actions by Kansas officials. *See, e.g., Sanchez v. Wells Fargo Bank, N.A.*, No. 08-2148, 2009 WL 56894, at *3 (10th Cir. 2009) (stating that "the propriety of the state district court judge's actions is a matter of obvious state interest and one that is best left, at least in the first instance, for review by the state appellate courts").

"Plaintiff has not met his burden to show that he will suffer irreparable

> harm or that he is being retaliated or discriminated against by defendants. Plaintiff was convicted in his Kansas criminal trial and therefore he cannot show that there was no hope for a conviction. Plaintiff asserts conclusory allegations that defendants continually exercised bad faith in prosecuting him because they failed to follow Kansas law in an unspecified way. Conclusory allegations will not suffice. *Weitzel,* 240 F.3d at 877 ("[I]t is the plaintiff's 'heavy burden' to overcome the bar of Younger abstention by setting forth more than mere allegations of bad faith or harassment.")." (Response, App. 13a)

Orcutt argues in his Petition for Writ of Mandamus at page 11 that all three exceptions to the *Younger* abstention doctrine apply in this case. He does not explain why.

The district court dismissed Orcutt's claims which arose out of his criminal conviction based on *Younger* because his criminal appeal was pending. Since then, his case was affirmed in part, reversed in part, and remanded to the state district court for further proceedings. As long as the criminal case is pending, *Younger* applies.

Even if Orcutt's criminal matter had been finally decided, *Rooker-Feldman* would apply to bar consideration of the claims arising out of Orcutt's criminal conviction. Either way, Orcutt's Petition for

Writ of Mandamus should be denied.

4. **The district court did not err in dismissing the balance of Orcutt's claims based on Fed.R.Civ.Pro. 12(b)(6).**

The district court dismissed the balance of Orcutt's complaint because he failed to state a claim. The Tenth Circuit Court of Appeals agreed that "the claims in Mr. Orcutt's complaint are so conclusory that we are unable to discern exactly what acts he is complaining about, or who is supposed to have committed those acts." (Petition for Writ of Mandamus, App. 4) Certainly, as to defendant Euler, there is absolutely no indication of what claims, if any, are brought against him or what role he played in any alleged violation.

Orcutt does not identify the dismissal of his claims on this basis as a question presented for review. He does not complain about their dismissal. This issue is waived.

CONCLUSION

Orcutt's Petition for Writ of Mandamus should be dismissed or denied.

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APPENDIX

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Opinion of the District Court
(filed September 23, 2009) 1a-18a

Case No. 2:09-cv-02025-MLB-DJW Document 94
Filed 09/23/2009

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

WILLIAM E. ORCUTT,	)	
	)	
Plaintiff,	)	CIVIL ACTION
v.	)	No. 09-2025-MLB
BRANDON LIBEL, et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM AND ORDER

Before the court are the following:

1. Defendants James Needham and Thad Geiger's motion to dismiss and memorandum in support (Docs. 28, 29); plaintiff William Orcutt's pro se response (Doc. 42); defendants' reply (Doc. 55); plaintiff's surreplies (Docs. 59, 67); and defendants' motions to strike plaintiff's surreplies (Docs. 62, 70)[1]

[1]Plaintiff filed a motion for leave to file out of time a response to Needham and Geiger's reply (Doc. 65). The court granted the motion (Doc. 66). Plaintiff filed essentially the same arguments in his second response (Doc. 67) as he did in his surreply (Doc.

2. Defendants Darrell Lamme, Larry Hunsaker, and City of Elwood, Kansas' motion for judgment on the pleadings and memorandum in support (Docs. 30, 31); plaintiff's response (Doc. 41); and defendants' reply (Doc. 46).

3. Defendant Joel Euler's motion to dismiss and memorandum in support (Docs. 32, 33) and plaintiff's response (Doc. 50). No reply was filed.

4. Defendants Doniphan County, Kansas and Jerry Dubach's motion for judgment on the pleadings and memorandum in support (Docs. 44, 45). Plaintiff filed no response.

5. Defendants Brandon, Tony and Brice Libel's motion to dismiss and memorandum in support (Docs. 75, 77); plaintiff's response (Doc. 83); and defendants' reply (Doc. 86).

Pro se plaintiff William Orcutt filed suit against defendants alleging violations under federal criminal statues 18 U.S.C.§§ 241, 1341, 1343, and 1962(c) and (d). Plaintiff further alleges violations under federal civil statutes 42 U.S.C. §§ 1981, 1983, and 1985. Essentially, plaintiff claims that defendants collectively conspired to illegally seize and sell his property in bad faith and used Kansas law and judicial proceedings to do so.

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59). As such, the court treats both responses to Needham and Geiger's reply and motion to strike as surreplies.

Defendants contend that the court lacks subject-matter jurisdiction and further that plaintiff has failed to state a claim under Federal Rules of Civil Procedure 12(b)(1), (6) and (c). Defendants variously asset other bases for dispositive relief but, in the interest of brevity, these will not be discussed.

For the following reasons, the aforesaid, dispositive motions are granted.

In addition, plaintiff has failed a second motion for leave to amend his complaint to add Jack Euler as a defendant.[2] (Docs. 91, 92). Mr. Euler is an attorney who submitted an order in the Farmers lawsuit. Plaintiff asserts that Mr. Euler "participated in the civil rights violations towards plaintiff by signing an improper and erroneous document which instigated and perpetuated the civil rights violations thereafter." Plaintiff's motion is denied as futile for the reasons specified herein.

I. PARTIES

1. Plaintiff was the defendant in two Doniphan County, Kansas civil lawsuits, Case Nos. 2006-CV-1 (the Farmers State Bank lawsuit) and 2006-CV-30 (the Troy State Bank lawsuit). He also was prosecuted and convicted by a jury in a Doniphan County, criminal trial, Case No. 2007-CR-16, for violating K.S.A. 21-3734 (impairment of a security interest). Plaintiff's appeal, case number 08-10395A,

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[2]Plaintiff's first motion to amend (Doc. 74) was denied.

is currently pending before the Kansas Court of Appeals.

2. Brandon, Tony, and Brice Libel ("the Libels") are officers of Farmers State Bank ("Farmers") and were witnesses during the Farmers lawsuit.

3. James Needham is the president of the Troy State Bank ("Troy") and was a witness during the Troy lawsuit.

4. Joel Euler is an attorney who represented Farmers in both civil lawsuits against plaintiff.

5. Ira Dennis Hawver is an attorney who represented plaintiff in both civil lawsuits.

6. Bobby (or Robert) Orcutt is plaintiff's brother allegedly forged plaintiff's name in "order to borrow money from [Farmers] at the instruction of Brandon Libel." (Doc. 77 at 7).

7. Thad Geiger and Needham were subpoenaed to testify in the felony criminal case against plaintiff.

8. City of Elwood, Kansas and Darrell Lamme and Larry Hunsaker who are employees of Elwood, are alleged to have violated plaintiff's rights.

9. Doniphan County, Kansas and Jerry Dubach, who is the sheriff of Doniphan County are also alleged to have violated plaintiff's rights.

II. FACTS[3]

In 1984, plaintiff started a farm and home equipment business in Wathena, Kansas in which he leased and rented equipment. In the 1990's, plaintiff formed A-1 Auto and Metal Salvage in which he bought and sold cars in Wathena. Farmers and Troy both made promissary notes and security agreements to plaintiff or his wife individually or to an entity that plaintiff owned. Plaintiff's employees, Jason Orcutt and Bobby Orcutt, also took out loans from Farmers. These loans were secured by personal property and personal guarantees to Farmers by plaintiff and his wife. (Doc. 78-22 at 2).

Farmers Lawsuit

Farmers called the notes that were due and named plaintiff both individually and doing business as A-1 Metal and Salvage, Inc., Farmers and Home Equipment and Orcutt's Auto Sales as defendants.[4] Plaintiff admitted liability on the promissory notes (Doc. 78-17 at 2) and stipulated that he and the other

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[3]Plaintiff's complaint is virtually devoid of facts. The court has been able to ascertain the facts set forth herein primarily from defendants' submissions.

[4]Farmers also named plaintiff's wife, Jason Orcutt, and Bobby Orcutt as defendants.

defendants, jointly and severally, owed Farmers $414,741.64. (Doc. 78-14 at 2).

The Doniphan County, Kansas district court ("the Kansas court") determined the interests and obligations of all defendants. The Kansas court found that an express agency relationship existed among plaintiff, Jason Orcutt, and Bobby Orcutt in that the later two were authorized to borrow money on behalf of plaintiff. (Doc. 78-22 at 2). The Kansas court entered judgment in favor of Farmers and granted its motion to extinquish redemption rights. (Doc. 78-23 at 2). The court ordered a sheriff's sale of the real estate located in Doniphan County and confirmed and approved the sale on December 5, 2007. (Doc. 78-25 at 2). No notice of appeal was filed.

Troy Lawsuit

Troy called the notes that were due and named plaintiff, his wife, and Farmers as defendants. The Kansas court found that plaintiff was delinquent on the promissory notes, security agreements, and real estate mortgages and foreclosed on various real estate and secured property. (Doc. 78-29 at 5). The Kansas court also found that plaintiff had waived his right of redemption. A sheriff's sale of real estate located in Doniphan County was ordered (Doc.78-31) and confirmed and approved by the Kansas court on June 22, 2007. (Doc. 78-30). No notice of appeal was filed.

III. 12(b)(1)

"[F]ederal courts are courts of limited jurisdiction [ ] [and] there is a strong presumption against federal jurisdiction." Beams v. Norton, 327 F.Supp.2d 1323, 1327 (D.Kan. 2004). A party may move for dismissal under Fed.R.Civ.P. 12 (b)(10 because the federal court lacks subject-matter jurisdiction. The plaintiff bears the burden to plead adequate facts, not conclusory allegations, that are sufficient to prove jurisdiction. Beams, 327 F.Supp. 2d at 1327 (citing Penteco Corp. Ltd. Partnership—1985A v. Union Gas System, Inc., 929 F.2d 1519, 1521 (10th Cir. 1991). Plaintiff has wholly failed to do so.

1. Rooker-Fedlman Doctrine

This court lacks jurisdiction to review final judgments from state court proceedings. 28 U.S.C. § 1257(a) provides: "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari ...." This statute has been interpreted to preclude review of final state court proceedings by federal district courts under Rooker v. Fidelity Trust Co., 263 U.S. 413, 416 (1923) and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482-3 (1983).

> The Rooker-Feldman doctrine "prohibits a lower federal court [both] from considering claims actually decided by a state court, and claims inextricably intertwined with a prior state-court

> judgment." Kenmen Eng'g v. City of Union, 314 F.3d 468, 473 (10th Cir. 2002) (internal citation and quotations omitted). A claim is inextricably intertwined if "the state court judgment caused, actually and proximately, the injury for which the federal court plaintiff seeks redress." Id. at 476. A federal case does not involve an "inextricably intertwined" state court judgment if the complaint challenges the constitutionality of the state law, so long as the state court did not address it and the plaintiff does not request the federal court to upset the state court judgment. Id.

Tal v. Hogan, 453 F.3d 1244, 1256 (10th Cir. 2006).

The court takes judicial notice of the Farmers and Troy civil foreclosure lawsuits and criminal prosecution in which plaintiff was a defendant. See Tal, 453 F.3d at 1265 n. 24 (noting that the "court may take judicial notice of facts that are a matter of public record"). The fact that the Libels have attached Kansas court documents and judgments and plaintiff's brief for the Kansas Court of Appeals does not convert their motion to dismiss into one for summary judgment. Fisher v. Lynch, 531 F. Supp. 2d 1253, 1266 n. 8 (D. Kan.2008) (citing Erikson v. Farmers Group, Inc., No. 03-6352, 2005 WL 2651312, at *2 (10th Cir. Oct. 18, 2005)).

The court finds that the Rooker Feldman doctrine precludes review of plaintiff's claims arising out of or otherwise related to the Farmers and Troy lawsuits. Viewed to the outer limits of liberal construction, plaintiff's allegations raise claims that were decided in favor of defendants by the Kansas court or are inextricably intertwined with the state judgments. The Kansas court found that Bobby Orcutt was authorized to borrow money on behalf of plaintiff by virtue of an express agency relationship.[5] The Kansas court interpreted the contracts and determined the contractual rights and interests of the parties in both the Farmers and Troy lawsuits. It also found that plaintiff had no right of redemption in both lawsuits.

The Kansas court entered judgments in both the Farmers and Troy lawsuits which entitled the banks to foreclose of their security interests and to execute on other property to collect the debt owed by plaintiff. The Doniphan County sheriff took possession of plaintiff's properties pursuant to the judgments and sold the property in a sheriff's sale. The Kansas court found that the sale was regular and in conformity with Kansas law and equity.

Plaintiff failed to appeal the Kansas court judgments in the Farmers and Troy lawsuits. Any RICO claim or defense that plaintiff might have raised could have been litigated in the Kansas court or on appeal. See Fox v. Maulding, 112 F.3d 453, 458 (10th Cir. 1997). He cannot now collaterally attack the

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[5]Plaintiff alleges that Bobby Orcutt was authorized to take out loans using his own name, but not by signing plaintiff's name.

Kansas judgments by filing § 1983 claims in federal court and allege that the parties involved in those proceedings violated his constitutional rights.[6] Anderson v. State of Colo., 793 F.2d 262, 263 (10th Cir. 1986) ("It is well settled that federal district courts are without authority to review state court judgments where the relief sought is in the nature of appellate review.").

Plaintiff is not challenging the constitutionality of the laws and rules that governed his state proceedings. He simply claims that defendants violated his constitutional rights and in effect, requests this court to upset the Kansas court judgments. As such, the court lacks jurisdiction to review plaintiff's claims. Feldman, 460 U.S. at 486; Tal, 453 F.3d at 1256. All counts, except Counts 5, 9, 13, and 27, are dismissed because they were either decided by the Kansas court

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[6]The court could also sua sponte dismiss plaintiff's complaint under Fed. R. Civ. P. 12(b)(6). Garrett v. Seymour, No. 06-7029, 2007 WL 549388, at *1 (10th Cir. Feb. 23, 2007). Plaintiff alleges in conclusory fashion that defendants collectively conspired to unfairly and in bad faith take his property in violation of federal constitutional law, federal statutes, and Kansas common law. At no point in his complaint does plaintiff make clear exactly which defendant did what alleged violation. "In § 1983 cases, defendants often include the government agency and a number of government actors sued in their individual capacities. Therefore it is particularly important such circumstances that the complaint make clear exactly who is alleged to have done what to whom, to provide each individual with fair notice as to the basis of the claims against him or her, as distinguished from collective allegations against the state." Robbins v. Oklahoma, 519 F.3d 1242, 1249-50 (10th Cir. 2008) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 565-6 n. 10 (2007)).

and final judgments were entered accordingly or are inextricably intertwined with those judgments. Counts 5, 9, 13, and 27 are dismissed for other reasons, infra.

2. Younger Doctrine

Plaintiff was convicted in the Kansas court for violating criminal statute K.S.A. 21-2734. His appeal is currently pending before the Kansas Court of Appeals. Defendants contend that the court must abstain under Younger v. Harris, 401 U.S. 37 (1971).

"Under the Younger abstention doctrine, federal courts should not 'interfere with state court proceedings ...' when a state forum provides an adequate avenue for relief." Weitzel v. Division of Occupational and Professional Licensing of Dept. of Commerce of State of Utah, 240 F.3d 871, 875 (10th Cir. 2001).

> A federal court must abstain from exercising jurisdiction when: (1) there is an ongoing state criminal, civil, or administrative proceeding, (2) the state court provides an adequate forum to hear the claims raised in the federal complaint, and (3) the state proceedings "involve important state interests, matters which traditionally look to state law for their resolution or implicate separately articulated state policies."

Id. (citing Amanatullah v. State Bd. of Medical Examiners, 187 F.3d 1160, 1163 (10th Cir. 1999)). If

the conditions are met, federal district courts must abstain. Id. (stating that "Younger abstention is non-discretionary[ ]").

There are exceptions to the Younger abstention doctrine, one of which is a state prosecution undertaken in bad faith "without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown." Id. at 876. The plaintiff bears a heavy burden to show that the state action was: (1) "frivolous or undertaken with no reasonably objective hope of success"; (2) "motivated by defendant's suspect class or in retaliation for the defendant's exercise of constitutional rights"; and (3) "conducted in such a way as to constitute harassment and an abuse of prosecutorial discretion, typically through the unjustified and oppressive use of multiple prosecutions." Id. at 877.

The court finds that the Younger abstention doctrine applies to plaintiff's case because he has failed to show that any, much less all, of the conditions do exist. First, plaintiff's appeal from his criminal conviction is currently pending before the Kansas Court of Appeals. Second, Kansas courts provide an adequate forum to hear plaintiff's complaints, which plaintiff is currently utilizing. Third, Kansas has an important state interest in considering defective complaints and prosecutions brought in bad faith and have state laws governing such actions by Kansas officials. See, e.g., Sanchez v. Wells Fargo Bank, N.A., No. 08-2148, 2009 WL 56894, at *3 (10th Cir. Jan. 9, 2009) (stating that "the propriety of the state district court judge's actions is a matter of obvious state

interest and one that is best left, at least in the first instance, for review by the state appellate courts[ ]").

Plaintiff has not met his burden to show that he will suffer irreparable harm or that he is being retaliated or discriminated against by defendants.[7] Plaintiff was convicted in his Kansas criminal trial and therefore he cannot show that there was no hope for a conviction. Plaintiff asserts conclusory allegations that defendants continually exercised bad faith in prosecuting him because they failed to follow Kansas law in an unspecified way. Conclusory allegations will not suffice. Weitzel, 240 F.3d at 877 ("[I]t is the plaintiff's 'heavy burden' to overcome the bar of Younger abstention by setting forth more than mere allegations of bad faith or harassment.").

The court therefore abstains from considering plaintiff's claims concerning his criminal information and prosecution under the Younger doctrine. Counts 9 and 13 are dismissed. This leaves Counts 5 and 27.

IV. 12(b)(6)

Defendants also move to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). The court construes liberally a pro se litigant's complaint. Dickerson v. Leavitt Rentals, 995 F. Supp. 1242, 1245 (D. Kan. 1998). "Pro se complaints are held to 'less

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[7]Actually, because plaintiff's complaint is entirely conclusory, it is impossible to determine which defendants supposedly violated plaintiff's rights in connection with the state prosecution, much less how they did so.

stringent standards than formal pleadings drafted by lawyers.'" Id. (quoting Hughes v. Rowe, 449 U.S. 5, 9 (1980)). Nonetheless, to withstand a motion to dismiss for failure to state a claim, a complaint must contain enough allegations of fact to state a claim to relief that is plausible on its face. Robbins v. Oklahoma, 519 F.3d 1242, 1247 (10th Cir. 2008) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)). All well-pleaded facts and the reasonable inferences derived from those facts are viewed in the light most favorable to the plaintiff. Archuleta v. Wagner, 523 F.3d 1278, 1283 (10th Cir. 2008). Conclusory allegations, however, have no bearing upon this court's consideration. Shero v. City of Grove, Okla., 510 F.3d 1196, 1200 (10th Cir. 2007). In the end, the issue is not whether the plaintiff will ultimately prevail, but whether he or she is entitled to offer evidence to support the claims. Beedle v. Wilson, 422 F.3d 1059, 1063 (10th Cir. 2005).

1. Counts 5 and 27

Plaintiff alleges that defendants violated criminal statute 18 U.S.C. § 241. "[P]rivate citizens cannot prosecute criminal actions" unless a private right of action can be inferred from the statutory language or elsewhere. Mamer v. Collie Club of America, Inc., 229 F.3d 1164, 2000 WL 1114237, at *2 (10th Cir. Aug. 8, 2000) (Table); King v. Keller, No. 06-4001-SAC, 2006 WL 1517765, at *6 (D. Kan. May 30, 2006).

The Tenth Circuit has noted that "Section 241 is a criminal statute prohibiting acts of conspiracy against the rights of citizens, and it does not provide

for a private civil cause of action." Newcomb v. Ingle, 827 F.2d 675, 677 n. 1 (10th Cir. 1987). Plaintiff makes no argument or cites no authority to the contrary. Nor does the court infer a private right of action in 18 U.S.C. § 241. Counts 5 and 27 are dismissed.

V. CONCLUSION

For the reasons stated more fully herein, defendants' motions to dismiss and for judgments on the pleadings (Docs. 28, 30, 32, 44, 75) are granted. Plaintiff did not have permission to file a surreply and the court has not considered his surreplies. (Docs. 59, 67). Needham and Geiger's motions to strike plaintiff's surreplies (Docs. 62, 70) are granted.

Defendant Hawver has answered (Doc. 23) but has not filed a dispositive motion. He shall have until October 2 to file such a motion.

A motion for reconsideration of this order is not encouraged. The standards governing motions to reconsider are well established. A motion to reconsider is appropriate where the court has obviously misapprehended a party's position or the facts or applicable law, or where the party produces new evidence that could not have been obtained through the exercise of reasonable diligence. Revisiting the issues already addressed is not the purpose of a motion to reconsider and advancing new arguments or supporting facts which were otherwise available for presentation when the original motion was briefed or argued is inappropriate. Comeau v. Rupp, 810 F. Supp.

1172 (D. Kan.1992). Subject to the conditions set forth in the next paragraph, plaintiff may file only one motion which shall not exceed five total pages and shall strictly comply with the standards enunciated by this court in Comeau. A motion that does not comply with these requirements will be stricken. Any responses to a motion for reconsideration shall not exceed three pages. No reply shall be filed.

Plaintiff was granted leave to proceed in forma pauperis,evidently without consideration of 28 U.S.C. § 1915(e)(2)(B). He has been allowed to proceed pro se. Nevertheless, it is apparent that some of plaintiff's submissions have been prepared either by a lawyer or by someone with legal training. See, e.g., Docs. 41, 42, 50, and 83. This court will not tolerate "ghost written" submissions and neither does the Tenth Circuit. See Duran v. Carris, 238 F.3d 1268, 1273 (10th Cir. 2001); Barnett v. LeMaster, No. 00-2455, 2001 WL 433413, at *3-4 (C.A.10 (N.M. (10th Cir. June 7, 2001); Wesley v. Don Stein Buick, Inc., 987 F. Supp. 884, 886 (D. Kan. 1997). Accordingly, BEFORE PLAINTIFF WILL BE PERMITTED TO FILE IN THIS COURT, EITHER BY PAPER FILING OR BY USE OF CM/ECF, ANY DOCUMENT REGARDLESS OF ITS DESIGNATION OR CONTENT, HE MUST OBTAIN THIS COURT'S PERMISSION. ON OR BEFORE SEPTEMBER 30, 2009, PLAINTIFF SHALL FURNISH TO THE CHAMBERS OF THE UNDERSIGNED JUDGE AND TO DEFENDANTS' COUNSEL A STATEMENT MADE UNDER OATH AND SUBJECT TO THE PENALTY OF PERJURY, WHICH FULLY SETS FORTH THE FOLLOWING:

1. PLAINTIFF'S EDUCATIONAL ATTAINMENTS, INCLUDING THE IDENTITY OF ALL POST-ELEMENTARY SCHOOLS PLAINTIFF HAS ATTENDED AND DATES OF ATTENDANCE;

2. WHETHER PLAINTIFF HAS LEGAL TRAINING OF ANY KIND, FORMAL OR INFORMAL, AND, IF SO, A FULL DESCRIPTION OF THE TRAINING, INCLUDING SCHOOLS ATTENDED, COURSES COMPLETED, DATES OF ATTENDANCE, AND DEGREES OR CERTIFICATES AWARDED, IF ANY; AND

3. THE IDENTITY (FULL NAME, ADDRESS, TELEPHONE NUMBER AND EMAIL ADDRESS) OF ANY PERSON WHO HAS ASSISTED OR IS ASSISTING HIM IN ANY FASHION IN LEGAL RESEARCH AND/OR PREPARATION OF SUBMISSIONS HE HAS FILED IN THIS COURT AND THAT PERSON(S) LEGAL TRAINING AND EXPERIENCE.

FAILURE TO SUBMIT THIS INFORMATION WILL SUBJECT PLAINTIFF TO CONTEMPT OR OTHER SANCTIONS. FED. R. CIV. P. 11(B) AND (C).

IT IS SO ORDERED.

Dated this 23rd day of September 2009, at Wichita, Kansas.

s/ Monti Belot
Monti L. Belot
UNITED STATES DISTRICT JUDGE